SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1970

No. 981

INDUSTRIAL UNION DEPARTMENT, AFL-CIO, and TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioners,

v.

THE BLACK HAWK CORPORATION and NATIONAL LABOR RELATIONS BOARD,
Respondents.

REPLY BRIEF FOR INDUSTRIAL UNION DEPARTMENT, AFL-CIO, AND TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, TO THE MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Petitioners,

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Respondent NLRB opposes Textile Workers Petition on the ground it was not timely filed. It is true, as the NLRB points out, that the 90-day period for applying for a Writ of Certiorari prescribed by 28 U.S.C. 2101(c) expired on November 16, 1970, and that no extension of time was granted. Petitioner was well aware of this expiration date, and with due regard for it mailed its Petitions to the Court five days prior to the expiration date, on the morning

of November 12th, with copies to the NLRB, the United States Court of Appeals for the Fourth Circuit, the Solicitor General, and to Blakeney & Alexander, attorneys for Respondent Black Hawk Corporation of J. P. Stevens and Company, Inc. Actually, on November 12th, Textile Workers Union of America made two mailings to the Court: (1) by certified mail, return receipt requested, a covering letter with an Affidavit of Service and the $100.00 check, and (2) by regular first class mail, the 40 copies of the Petition. Of these six mailings (the two to the Court and the four to the parties listed above), five arrived without problem. The Solicitor General's mimeographed receipt reflects the fact that his copy of the Petition arrived November 13th. The certified mail receipts indicate that the other three of the four listed copies arrived at about the same time. The Office of the Clerk of the Court has informed us that the Court received our letter, which had been mailed simultaneously with our Petitions, on November 13th.

Thus, it is clear that the mailing date was reasonably chosen to get the Petitions to the Court in [illegible]ple time.

The Post Office, however, chose to sit on the Petitions themselves. The Petitions did not arrive at the Court until November 17th.

There is no question but that 28 U.S.C. 2101(c) provides that a Writ of Certiorari must "be applied for" within ninety days after the entry of judgment or decree. Textile Workers did apply for a Writ of Certiorari—with all due diligence—within ninety days. The NLRB nevertheless asserts that our application was not timely.

It would certainly be true that if Respondent NLRB had waylaid Petitioner Textile Workers' messenger to the Post Office, so that the Petition was prevented from reaching the Court because of the Government's waylaying, it would not be held that we had failed to apply timely.

Here it was not the NLRB, but a sister branch of the Government, namely the United States Post Office, which waylaid the mail. The Government should not be permitted to profit from its own negligence.

Respondent J. P. Stevens has been found to have violated the National Labor Relations Act in a gravely serious continuing pattern in five decisions of three United States Courts of Appeals, and in addition in five decisions of the National Labor Relations Board besides the one here in question. Respondent Stevens has been found to have discharged 117 employees because of their exercise of the rights under the National Labor Relations Act. The decision below in the instant case is a mutation within this pattern, rewarding recidivism. The decision should be reviewed by the United States Supreme Court, if the National Labor Relations Act is a statute to be enforced, rather than a Volstead Act, the violation of which is to be publicly accepted.

If Petitioner had been in any way at fault in the failure of the petitions to reach the Court November 16th, it might conceivably make sense to hold that we had not, within the meaning of Section 2101(c), "applied for" certiorari within 90 days. But it is the Government, and only the Government, which was at fault. They should not now be heard

to claim that their delay can deny Petitioners the opportunity to seek certiorari.

Respectfully submitted,

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Dated: New York, N.Y.
December 18, 1970